

January 22. 1767.

Unto the Right Honourable the Lords of Council and Session,

T H E
P E T I T I O N

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JAMES BOGIE Tanner in Lesly, David Miller in Wandersknow, Andrew Inglis in Kirkaldy, John Landale in Parks of Balgony, James Anderson in Doctoun, Robert Swan in Fruchie, and Andrew Shoolbred in Falkland,

Humbly sheweth;

THAT several years ago, a considerable number of persons seceding from the establishment of the church of Scotland, agreed to erect a meeting-house for religious worship at Lesly, and to establish a minister there on the principles of the secession.

For this purpose, considerable sums of money were borrowed on the credit of particular members, and contributions were made by them and others, for purchasing a piece of ground and erecting a fabrick. A piece of ground was accordingly purchased, the feudal

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right

right to which was taken in the name of the petitioner James Bogie, in conjunction with Henry Belfrage, who were accordingly infest therein, and a house was erected.

It was not intended that these two should be absolute proprietors, though it was convenient to take the feudal right in their name, James Bogie therefore, and Henry Belfrage, granted a tack of the subject in favours of the following twelve persons, *viz.* Henry Shoolbred, Robert Swan, James Anderson, George Hoy, David Miller, Andrew Inglis, Thomas Ireland, James Goodwillie, Alexander Greig, John Landale, David Henderson, and Andrew Inglis 2d, and their heirs, subtenants and assignees, and that for the whole space of Ten nineteen years, from and after their entry thereto, which was declared to commence at the term of Whitsunday 1744, with full liberty of building, demolishing, and rebuilding on the ground of the said subjects, as the tacksmen, or their forefairs, or the major part of them should think fit. For the which causes, the tacksmen obliged themselves, &c. to relieve Bogie and Belfrage, of the whole reparations of the said tenement, and of the yearly feu, kain, and vicarage duties, and other public burdens imposed, or to be imposed, or any way due, or that shall be due and payable, for and furth of the said subjects during the tack. This tack was signed by the two proprietors, and by eight of the twelve tacksmen; the four who do not sign it, are Henry Shoolbred, Robert Swan, George Hoy, and Andrew Inglis 2d.

This tack bears, That it should be without prejudice to an obligation granted by Henry Belfrage and James Bogie of the same date; by this obligation they became



came bound to denude “ the heretable right of the
 “ said tenement, and infestment following thereon ;
 “ and that in favour of any person or persons, for such
 “ value and price as we, the said Thomas Ireland, &c.
 “ (here the names of the twelve tacksmen are in-
 “ serted) or the major part of us all, or of our respec-
 “ tive heirs or representatives, and of the assignees to
 “ the said tack, shall think proper ; and to grant and
 “ subscribe a valid right and disposition in favour of
 “ the person or persons accordingly, which shall be
 “ fixt and agreed on by us, and the said other per-
 “ sons above designed, or our or their forefairs, or the
 “ major part, notwithstanding the said tack and the
 “ long term of years therein contained; without pre-
 “ judice always to us, and the other persons above de-
 “ signed, of our and their above-written, and assign-
 “ nees forefairs, and all others concerned, of the pro-
 “ per and respective shares and interest in the said
 “ value and price of the said subjects.”

Mr Erskine being chosen minister of this congrega-
 tion, they lived for some time in great harmony and
 unanimity ; but at last a difference arose among them
 concerning the burghs-oath, tho’ they had all at first
 held this oath to be lawful, yet their minister having
 changed his opinion, some of the congregation joined
 him in their sentiments, and thus they split into two
 sects or divisions.

Those who held the burghs-oath to be unlawful,
 having the minister on their side, exerted themselves
 with great keenness against those of a different per-
 suasion : Not only were their principles and practice
 inveighed against from the pulpit, but a formal Ana-
 thema was denounced against them, and days of
 fasting

fasting and prayer were held for a divine ratification of this their sentence of excommunication, whereby all who took the burghs-oath, or held it to be lawful, were solemnly delivered over to Satan.

This step was truly a violent exclusion of all but those of the sect, commonly called Antiburghers, from the use of the meeting-house, which had been in a great measure erected at the expence of those who held no such principles; for an antiburgher minister being in possession of the pulpit, and perpetually thundering out Anathemas against those who called the burghs-oath lawful, nay, who even carried his zeal so far as to join in an Anathema against his own father Mr Erskine of Dunfermline, on that account; it was impossible for those who were not of sentiments as violent as himself, to have any use of this meeting-house for religious worship.

It is true, those denominated Antiburghers were fewer in number in this congregation than those of another persuasion; and had the latter had recourse to force, there is no doubt but they might have made themselves master of the place of worship: But as, by the accident of Mr Erskine espousing the antiburgher side of the question, the antiburghers had got into the actual possession of the house, those of another persuasion chose not to embroil themselves by violent measures, for they continue that possession still.

A number of the congregation therefore, who did not espouse the principles of the antiburghers, seeing the use of the meeting-house, which had cost them considerable sums, thus withheld from them, and being at the same time unwilling to take any course that might be attended with tumult and disorder, brought an action before the Sheriff of Fife, narrating the tack
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and obligation above mentioned, and subsuming,
 “ That they being an equal number with the subscrib-
 “ ing heretors and tacksmen mentioned in the said
 “ tack, had good and undoubted right to the just and
 “ equal half of the rents, mails, and duties of, and a-
 “ rising from the heretable subjects above mentioned,
 “ particularly the whole rents payable by the defen-
 “ ders, and others, for their possession of the seats
 “ within the church erected by the said proprietors
 “ and tacksmen, upon the ground of the said here-
 “ table subjects to the extent of L. 40 Sterling yearly :
 “ And sicklike, the rents of the other houses, to the
 “ extent of L. 30 Scots yearly, which, from Martin-
 “ mas 1747, when the pursuers were excluded, to Mar-
 “ tinmas then last 1751, extended to L. 410 Sterling,
 “ the just and equal half of which belonged to the
 “ pursuers, and of L. 5 Sterling of expences of plea,
 “ and also the yearly rent of L. 102, 10s. Scots for the
 “ current year, and yearly in time coming, during the
 “ not sale of the said subjects : And sicklike as the said
 “ heretable subjects would not divide equally without
 “ great inconveniency, that the defenders should be
 “ decerned to join and concur with the pursuers in a
 “ public roup and sale of the subjects, and the same
 “ by a decret of court be ordained to be sold accord-
 “ ingly ; at least, to be estimate and appretiate by persons
 “ of skill, and the defenders decerned either to de-
 “ nude themselves of the said subjects in favours of
 “ the said pursuers, upon payment of the half of the
 “ price ; or to pay to the pursuers the half of the said
 “ price or value, on their denuding themselves in fa-
 “ vours of the defenders, which of the two the defen-
 “ ders should, by a writ under their hand, make choice
 B “ of;

“ of; and, failing that, which of the two the pursuers should make choice of by a writ under their hand.”

After much litigation in this action, the Sheriff pronounced the following interlocutor: 11th January 1753,
 “ Finds the pursuers and defenders to be equal proprietors of the subjects libelled, and that the defenders ought to keep possession of the said subjects, and pay to the pursuers the just and equal half of the value and price thereof; and that the said value may appear, the Sheriff appoints

“ to value the said subjects and report it on oath; and in case the defenders shall not agree to hold the subjects, and pay the value to the pursuers, then he ordains the pursuers to get possession of said subjects, and pay said value to the defenders; and, in case none of these methods shall be gone into by the parties, the Sheriff appoints the foresaid subjects to be sold at a public roup to be duly advertised, and the price arising from said roup to be equally divided among the parties; reserving the consideration of the rent till the event of what is above.”

And upon a reclaiming petition for the defenders, and answers thereto for the pursuers, the Sheriff pronounced another interlocutor in the following terms:
 “ Appoints the pursuers and defenders, betwixt and the first day of May next, to give in a condescendence of two or three persons for each party, for putting a value on the subjects in question, to whom the Sheriff will add such persons as he shall judge proper; and, in case of their failure, the Sheriff will appoint proper persons to put a value on said subjects.”

“ jects, and ordain the same to be roused and sold,
 “ and the price applied in terms of the former inter-
 “ locutor.”

Upon this, the defenders removed the cause by advocacy into this Court. The advocacy came in course of the rolls before the Lord Woodhall Ordinary, before whom there were some proceedings, his Lordship having advocated the cause and made avilandum therewith.

But in the mean time, another action was brought in this Court. A majority of the twelve tacksmen were now in opposition to the antiburghers, though formerly they had been equally divided between the two sects. These brought an action against James Bogie and Henry Belfrage, in terms of the obligation 7th April 1744, concluding that they should denude in favour of the majority of the tacksmen.

In this action it was disputed, on which side the majority of the persons, mentioned in the foresaid tack and obligation, lay. *Secondly*, On the part of the defenders it was argued, that the tack and obligation behoved to be held as a part of one deed, and could not subsist separately; that the tack was void, as not being signed by all the tacksmen, and consequently the obligation, as depending upon the tack, was void. And *Thirdly*, It was argued, that the tack and obligation were never compleated nor delivered evidents; and in proof of this, an appeal was made to the minutes of the sederunt of the society.

After some litigation, the Court pronounced the following interlocutor: “ On the report of the Lord July 12.
 “ Alemoor, the Lords sustain the defences, and assoil- 1764.
 “ zie the defenders, and find the pursuers liable to the
 “ defenders

“ defenders in the expences of extracting the decret,
 “ as the same shall be ascertained by the Collector of
 “ the Clerks fees, and find no other expences due ;
 “ and decerns.”

The former process of advocacy had been allowed to lie dormant, during the proceedings in the action before this court. But when this latter had been determined by your Lordships, the former was awakened, and again insisted in. Being now remitted to the Lord Kaims Ordinary, in place of the late Lord Woodhall, and a debate having happened before his Lordship, and minutes thereof having been made up, his Lordship was pleased to pronounce the following interlocutor :

July 2.
1766.

“ The Lord Ordinary, upon advising these minutes,
 “ with the foregoing steps of the process, considering
 “ that the house in question was erected for public
 “ worship, and that the pursuers never have been ex-
 “ cluded from using it for that purpose in conjunction
 “ with the defenders, Finds, there is no foundation
 “ for this process, and therefore dismisses the same:
 “ Finds expences due, and allows the defenders to
 “ give in an account of their expences.

Against this interlocutor a representation was preferred, to which answers were given in, and the Lord Ordinary, on the 3d December 1766, refused the desire of the representation, and adhered to his former interlocutor.

The petitioners then preferred a second representation, on which the following deliverance was given :
 “ The Lord Ordinary having considered this represen-
 “ tation, refuses the desire of the same, and adheres
 “ to his former interlocutor.”

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Of these interlocutors of the Lord Ordinary, the petitioners do humbly crave a review by your Lordships. They bear very hard upon them, as, in the present situation of matters, tho' they have been at very considerable expence in erecting a meeting-house at Lesly, yet they are excluded from the use of that meeting-house by the defenders, nor can they obtain any retribution of the expences they have been at : And several of the pursuers are still personally bound for part of the price of the subjects thus withheld from them, which still remains unpaid, and for which they are liable to all the execution of the law : The consequences too of the division are interesting, being, that the property of all the meeting-houses in Scotland must be vested in the minister, who, by adopting a particular set of tenets, may put any number of his flock, with their friends, in possession of the place of worship, and exclude the rest of the congregation, however great their number, without a possibility of redress.

The defenders have argued, that they do not exclude the petitioners from the use of this meeting-house; that they make them welcome to join in communion with them, and if they chuse to do so, they may return and take possession when they please. But then your Lordships will observe, upon what terms this must be done. They must condemn, as unlawful, the burghs-oath, which, in their conscience, they are persuaded may lawfully be taken : They must join formally in excommunicating all who hold this oath to be lawful, which they themselves cannot in conscience condemn : They must deliver them over to Satan, and keep days of fasting, prayer, and humiliation, for the divine ratification of this tremendous sentence; a conduct they would not follow with respect to any human creature, be they of

what persuasion they will ; and after all, they will find their seats and places in the church occupied by others, who would claim a preferable title to them, on the sets they have obtained from the defenders.

This meeting-house, therefore, is in reality as forcibly withheld from the pursuers, as if the doors of it were shut against them, when attempting to get admittance. In equity and in natural justice, they are intitled to reparation for their property being thus violently withheld from them.

And this demand they make with the better grace, that at the time this meeting-house was erected, the sect of antiburghers was unknown among the contributors towards the fabrick. They started up afterwards under the tutelage of a violent minister, and at last fairly turned those out of possession, on the plan of whose principles the congregation was formed.

But laying all these religious disputes out of the question, the pursuers apprehend that they are well intitled to insist in the present action, without assigning any cause for their so doing, further than it is no longer their pleasure that the society should continue on its present footing.

The proprietors of this house are no incorporation; of consequence they cannot have perpetual succession: They are a simple *societas rei singularis*, and their right must be regulated by the usual laws of a society.

Now, the petitioners are advised, that no principle is better founded in law than this, that every society is dissoluble at the option and pleasure of any of the members. Thus Lord Stair, book 1. tit. 16. § 5. says, " It is
" most consonant to the nature of society to be dissol-
" ved at the option and pleasure of any of the part-
" ners,

ners, it being very contrary thereto, and much impeding of the ends of it, that any should be continued a partner against his own will; and therefore ordinarily, not only the express renunciation of the society, but any contracting or acting separately in the matter of the society, dissolveth it."

And what the remedy is in the case of such a dissolution, is clearly pointed out in the preceeding paragraph, where, treating of the power of administration vested in the *socii* and particularly of the majority, freighting a ship on a dangerous voyage, contrary to the opinion of the minority, his Lordship says, "Yea the protesting of any of the owners against the skipper and major part, will not make them liable for the protesters part of the ship if she be cast away; tho' it be the law in maritime cases in some places; *because of the ordinary and usual remedy here, of a roup at the half or major part of the owners against the rest, or a set at any of the owners instance against the whole, either to take his part at such a rate, or quit their parts at the same price, or roup his own part when he pleases:*"

And afterwards in the same paragraph says, "It is also consistent with the nature of this contract, to give a negative vote to one or more of the society, whose interest in the stock, or whose skill and industry is esteemed the greatest, but the simple nature of the society itself is the most tender engagement; and so if it be not otherwise provided, it is always dissolvable at the option and the choice of any of the society; which implies that the management is in the whole partners equally, and that every one hath a negative vote; and therefore when it is contracted

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“ to a time that it may not be parted from, in that case
 “ the interest and end of society is changed; and if the
 “ minor part will not cede to the major part, or to ar-
 “ bitrium, it must be decided by the Judge-Ordinary,
 “ which of the parts is most conduceable to the socie-
 “ ty. As in ships as said is, so in heritage, *actione familie*
 “ *heriscundæ*, and in other things, as legacies &c. *actione*
 “ *de communi dividundo*.”

Nothing can be more clear than this opinion of Lord
 Stair; and the petitioners submit it to your Lordships,
 whether the procedure in this action before the Sheriff
 hath not been exactly conformable thereto; for in the
 action *familie heriscundæ*, if the subjects cannot be ac-
 tually divided, which in the present case it is clear they
 cannot, they are adjudged to one or other of those ha-
 ving interest in them, and he to whom they are adjudged,
 is made liable to the others having interest in a pecuni-
 ary retribution, according to the value of such interest.
 This is clearly laid down in the writers in the civil law,
 in which this action had its original: Thus, Voet in his
 commentary on the Pandects, *lib. 10. tit. 2. § 22.* tells
 us, “ Quod si commodam res hereditariae non recipi-
 “ ant divisionem, aut saltem damnum ex divisione re-
 “ dundaturum sit, res singulae singulis, quantum fie-
 “ ri potest, adjudicandae sunt; ipsique rem ex adju-
 “ dicatione tenentes, vicissim reliquis pro rata in cer-
 “ tam condemnandae pecuniae quantitatem, si in al-
 “ terius persona adjudicatio praegravare videatur, si-
 “ ve aequaliter, siue proportionibus inaequalibus haere-
 “ des sint. § *Si familie 4. inst. de offic. Judicis L. ad officium 3*
 “ *C. communi divid.* Neque enim audiendi, qui adjudicati-
 “ onem rerum ei faciendam putant, qui majore ex par-
 “ te

“ te dominus est ; cum ita individuae res omnes haere-
 “ ditariae uni, qui majore ex parte haeres est, assignan-
 “ dae forent, non singulae singulis contra d. l. 3. et
 “ d. §. 4.”

And that the Roman law from which our consuetudi-
 nary laws concerning consensual contracts is derived,
 was the same as that here laid down by Lord Stair, is
 clear from these titles of the Pandects, *Communi dividundo*
 and *pro socio*; only, from the great nicety they observed
 in distinguishing actions, they did not allow of the ac-
 tion *familiae erciscundae* to any but heirs; *socii* were obli-
 ged to take themselves to the action *communi dividundo*,
 between which however there seems no real difference
 but the name, for the same adjudications and retribu-
 tions took place in the one as in the other.

The petitioners therefore humbly apprehend, that
 the sentence pronounced by the Sheriff of Fife, was such
 as was agreeable to the dictates of law, and therefore
 ought to be supported.

It hath been contended on the part of the defenders,
 that the present action was deserted when the other ac-
 tion was brought in this court; that therefore it cannot
 now be resorted to and followed out.

But that this was not the case is very clear. It became
 necessary to sist procedure in the present action, when the
 other was brought. In this action, James Bogie and Hen-
 ry Belfrage, in whom the feudal property was vested,
 were disputing about the division of the subject; in the
 other action they were both called on as defenders, to
 denude of that subject in favour of third parties; the
 present action therefore could not proceed till that one
 was determined. As soon as it was determined, the
 present action was awakened and insisted in.

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It hath also been argued, that the decision in the former action is a *res judicata quoad* this, and leaves no room for any procedure therein.

But for this argument there seems not the smallest foundation. The action brought in this court related intirely to the effect of a particular obligation, which again depended upon the effect of a tack ; and that tack was null, not being subscribed by all the contracting parties. The pursuers therefore failed in their action, because it rested on the footing of a null and ineffectual deed : In consequence of which, the absolute property of the subjects became vested in James Bogie and Henry Belfrage. That decision cannot prevent either of them from insisting for a division of their common property, which is the tendency of the present action.

May it therefore please your Lordships, to alter the Lord Ordinary's interlocutor, and to decern in terms of the conclusions of the libel.

According to Justice, &c.

AND. CROSBIE.

